JUDGMENT : The Hon Mr Justice Colman : Commercial Court. 6th May 2004

1. Introduction

2. This is an arbitration application under section 68 of the Arbitration Act 1996 ("the 1996 Act") to challenge an international arbitration award dated 7 May 2003. As originally formulated, these proceedings also challenged the arbitrator's Correction Award dated 26 June 2003, but Mr Crystal indicated in the course of the hearing that this was not advanced as an independent point. Margulead's claim in the arbitration failed, as did Exide's counterclaim.

3. Two grounds are relied upon by the Claimant. First, it is said that contrary to section 68(2)(a) of the 1996 Act, the sole arbitrator failed to permit Mr Daly, counsel for Margulead to reply orally to closing submissions by counsel for the Respondent ("Exide"). Secondly, it is submitted that contrary to Section 68(2)(d) in preparing his Final Award the arbitrator failed to consider or even refer to an argument advanced by Margulead that Exide had affirmed the contract in dispute and therefore could not rely on the allegation that the contract had been entered into by mutual mistake. I refer to these two grounds as "the Reply Point" and "the Affirmation Point" respectively. It is submitted that on both of those grounds there was serious irregularity which caused substantial injustice to Margulead. However, it is quite rightly accepted on behalf of Margulead that if there were no serious irregularity in respect of the Reply Point it could not establish that there had been substantial injustice caused by serious irregularity in relation to the Affirmation Point. Consequently, in order to succeed on this application, Margulead must establish that there was serious irregularity in relation to the Reply Point which caused substantial injustice before it can establish that there has been substantial injustice caused by either Point.

4. The Issues in the Arbitration

5. Margulead is an Israeli company which specialises in lead extraction. Exide, incorporated in Delaware, USA, is a leading manufacturer, supplier and recycler of lead-acid batteries. Margulead developed what it claimed to be a new method of extracting lead from batteries but it needed the technology to be proved in a large scale extraction plant. On 13 June 1967 it entered into an agreement with Exide under which the latter agreed to build a pilot plant for this purpose which was to be completed by 28 October 1998. Exide never commenced construction of the pilot. It asserted that there was no reasonable prospect of the process designed by Margulead ever being capable of achieving the criteria as to cost effectiveness laid down in the agreement. Exide terminated the agreement on 28 August 1998.

6. The agreement was expressly governed by the laws of "the United States" which was treated by both parties as incorporating the Law of the State of Georgia.

7. The agreement incorporated the following arbitration clause:

> 8.3 Arbitration. *Any dispute arising from or relating to this Agreement or the parties' performance thereunder shall be submitted to binding arbitration. The Arbitration shall be held in London, United Kingdom, in accordance with the rules of the United Nations Commission on International Law ("UNCITRAL") with the London Court of International Arbitration as appointing authority. The arbitration shall be conducted in English by a sole arbitrator, appointed by the London Court of International Arbitration. The parties shall request that the arbitrator's award be reasoned and in writing. The costs of the arbitration (but not expert's or attorney's fees) shall be borne one-half by Margulead and one-half by GNB. The parties agree that the decision of the arbitrator shall be final and non-appealable, provided that the party prevailing in the arbitration shall be permitted to initiate and prosecute judicial proceedings to enforce the award of the arbitrator. Each of the parties hereby agrees that it shall submit to the jurisdiction of any court in which such judicial enforcement proceedings are brought."*

8. Margulead claimed that Exide had wrongfully repudiated the agreement and applied to the LCIA for the appointment of an arbitrator. On 13 May 2002 Mr Paul Hannon, an experienced international arbitrator, was appointed sole arbitrator. By agreement the proceedings were conducted in accordance with the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration. Both parties were throughout represented by Counsel.

9. By its Amended statement of claim of 4 March 2003 Margulead alleged that Exide acted in bad faith in rejecting the new processes without any sufficient explanation. Exide was in breach of contract in failing to build the plant. Margulead had thereby lost the opportunity of having the process proved and it claimed damages totalling $13 million including the cost of employing a substitute testing organisation.

10. Exide alleged that the agreement was induced by negligent misrepresentations to the effect that the process was developed and effective to achieve the criteria in the agreement. Therefore, Exide was entitled to rescind the agreement. Secondly, it was alleged that Margulead had failed to provide Exide with certain information under Article 1.3 to the effect that Exide's obligation to construct the plant was suspended. Thirdly, there was an implied condition that Margulead's process was capable of meeting the contractual criteria and Margulead was in repudiatory breach of this term with the result that Exide was entitled to and did accept such breach as terminating the agreement.

11. By written memorials exchanged in March 2003, a few days before the hearing before the arbitrator, the parties put forward the submissions on which the hearing was conducted. Exide repeated in substance what had already been alleged in its defence but added additional alternative points, including that if neither party was at fault in relation to performance of the agreement, there had been a mutual mistake of fact in entering into the

agreement, the mistake being the shared belief that Margulead's technology was capable of supporting a pilot plant with an output of 10 mt per day.

12. The hearing took place in Chicago over four days on 25 to 28 March 2003. Following oral openings of about one hour each, first on behalf of Exide and then on behalf of Margulead, evidence was called. Then at the end of the third day's hearing after the conclusion of the evidence, the arbitrator directed that on the fourth day the hearing should consist of a final speech of one hour by counsel for Margulead (Mr Daly) followed by a final speech of one hour by counsel for Exide (Mr Haubold) and thereafter what he called a "colloquy" which was to be either tripartite or bilateral.

13. In the course of that hearing Mr Daly had objected to the taking for the first time of two points introduced by Exide only at the stage of pre-hearing memorials, namely mutual mistake and a further point on want of consideration.

14. On the fourth day, after Mr Haubold had completed his final oral submissions, the following exchange took place between the arbitrator and Mr Daly:

"The Arbitrator: I don't think – thank you very much, Mr Haubold. I have just really a few questions. I think we can probably wrap this up before we go to lunch because I have just a few questions. Let's see, in any event.

Mr Daly: Excuse me, would you not – I am going to reply?

The Arbitrator: No, I don't think so. I think you did a very admirable job of stating your case. I don't think that there is – that its necessary to reply to Mr Haubold."

15. The colloquy then continued without objection by Mr Daly and with the arbitrator asking both counsel a number of questions on key points. In conclusion, the arbitrator indicated that he was "intrigued" by the mistake of fact argument and that he would like to have it further developed in written briefs to be received by him by 14 April. The parties were also given the opportunity of further written submissions on the want of consideration argument. After these matters had been discussed the arbitrator told the parties that all submissions had been completed except for the written briefs and closed the hearing.

16. On 14 April Margulead's further written brief was served. It extended to 43 pages drafted by Mr Daly. It included the submissions that there was no common assumption as to the material facts, that under the law of the State of Georgia, Exide, having failed to exercise due diligence bore the risk of a mistake as to any common assumption and that, even if a mistake would otherwise have been a defence to Margulead's claim, it could not be relied upon by Exide because it had waived reliance on mistake by its election to go on with the agreement, that is to say, it had affirmed the agreement.

The Award and the Correction Award

17. The Award was published on 7 May 2003. Its conclusions on the main issues can be summarised as follows:

i) *Exide was not excused from performance on the grounds of misrepresentation: there had been no reliance on such representation and the delay precluded this defence.*

ii) In accordance with an implied condition of the agreement Exide was not obliged to construct the plant if it rightly took the view that Margulead's process was not technically to commercially viable. The process was not technically viable.

iii) There was no total failure of consideration.

iv) Exide was entitled not to proceed with performance on the grounds of Margulead's failure to comply with an express obligation under Article 1.3 to deliver detailed costs quotations.

v) Exide and Margulead together mistakenly assumed, at the time of entering into the Agreement, that the process was ready for pilot plant implementation.

vi) Exide's scanty due diligence was not such as to amount under Georgia Law to such violation of a legal duty as would disentitle it to rely on mutual mistake.

vii) In paragraph 3.7 the arbitrator stated as follows: "Exide argues that it was legally permitted to terminate the Agreement by reason of a number of arguments. Its arguments that it was excused from continuation of the project by reason of Margulead's breach of its obligation to deliver the pilot plant equipment quotations, and by reason of Margulead's breach of an implied covenant that the Margulead Process would render results markedly reasonably consistent with the Success Criteria, are legally viable. However, the Tribunal finds that the doctrine of mutual mistake of fact fits the actual situation much more realistically. As a result it finds the Agreement unenforceable and determines that equity dictates that the parties be left where they stand, neither collecting damages from the other."

viii) In paragraph 5.1 the arbitrator further stated: "For the reasons stated above, the Tribunal finds the Agreement unenforceable as a result of a mutual mistake of fact."

18. It will be observed that, although the Award did refer to Exide having lost the right to rescission for misrepresentation due to failure to act promptly (paragraph 3.3.10), no reference is made to the argument advanced on behalf of Margulead in its post-hearing brief that there had been waiver of the right to rescind for mutual mistake.

19. The Award therefore concluded that Margulead was not entitled to succeed on its claim nor Exide on its counterclaim.

20. Following the Award Margulead's solicitors wrote on 21 May 2003 to the arbitrator complaining about various features of the arbitrator's conduct of the arbitration and of the award, including in particular the arbitrator's refusal to permit Mr Daly to have a right of reply on two points, namely the implied term as to the ability of the process to achieve the relevant criteria and as to the allegation of breach of Article 1.3 of the agreement by Margulead in failing to issue quotations. The solicitors requested an additional award stating why affirmation had not been dealt with in the main Award and how Exide could be entitled to rely on mistake of fact if there had been affirmation as submitted on behalf of Margulead.

21. Following further correspondence between both parties' solicitors and the arbitrator, on 20 June 2003 Margulead's solicitors by letter dated 20 June 2003 called on the arbitrator to make an Additional Award pursuant to Articles 35 and 36 of the UNCITRAL Rules to clarify ambiguities and correct errors in the published Award and under Article 37 as to "claims presented in the arbitral proceedings but omitted from the award". They asserted that Margulead's submissions as to affirmation were a "claim" for the purposes of that Article.

22. By a Correction Award dated 26 June 2003 the arbitrator held that there were no ambiguities to engage the application of Article 35. He further held in relation to Article 37 that the submission as to affirmation was not a "claim" within that Article and that the Award had dealt with and rejected each of Margulead's claims. The Correction Awards stated in paragraphs 2.10 and 2.11:

> *"2.10 Margulead confuses its arguments in support of claims with the claims themselves. It requests the Tribunal to readdress its many arguments. The Tribunal has neither the power nor the inclination to do so.*
>
> *2.11 To the extent Margulead's arguments had any apparent merit, the Tribunal gave them full consideration in the preparation of the Final Award. It is not permitted to reconsider the substance of its Final Award as Margulead apparently would wish it to do."*

23. There followed the correction of various typographical errors.

24. The Reply Point

25. Mr Crystal argues, on behalf of Margulead, that, by his response to Mr Daly's request to reply to the final oral submissions of counsel for Exide on the last day of the hearing, the arbitrator represented to Margulead that he was accepting Margulead's arguments as to the implied term as to technical viability and as to the alleged breach of Article 1.3. If that were not the arbitrator's position it was incumbent on him to call on Mr Daly to reply. Mr Daly did not object at the time because he justifiably assumed that the arbitrator was with him on those points. The right of reply could, if exercised, have persuaded the arbitrator to reach a different conclusion on those issues.

26. In my judgment, this argument cannot be sustained.

27. In order to establish that there has been a serious irregularity of the kind described in section 68(2)(a) of the 1996 Act, it must be shown that the tribunal has failed to comply with its general duty under Section 33(1). That duty is defined as follows:

> *"(1) The tribunal shall –*
>
> *(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and*
>
> *(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."*

28. At the end of the third day the arbitrator had made it very clear to those appearing at the hearing what procedure was to operate on the last day of the hearing. That procedure involved just two oral closing submissions, the first by Mr Daly on behalf of Margulead and the second by Mr Haubold on behalf of Exide. There was no provision for Margulead to have the last word as would have been the case under English court procedure. But it must or ought to have been clear to all concerned that the arbitrator was following an order of speeches combined with written submissions which did not correspond with that in this court. Indeed, at the commencement of the hearing Exide's counsel had given the first oral opening, notwithstanding Exide was respondent.

29. There was nothing wrong with this form of procedure, provided always that it gave each party *"a reasonable opportunity of putting his case and dealing with that of his opponent"*, in accordance with Section 33(1)(a), and represented in all the circumstances of the case a fair means for the resolution of the matters falling to be determined in accordance with Section 33(1)(b). The proposition that, because Margulead had the burden of proof as claimant, it would necessarily be denied a reasonable opportunity of putting its case or a fair hearing unless its counsel had the last word is not sustainable. It is not suggested that in the course of Mr Haubold's final oral submissions on behalf of Exide he raised any point that was novel and had not already been covered in the pre-hearing memos or the opening submissions and which therefore had not been addressed on behalf of Margulead either orally or in writing. I can see that if that had occurred there might have been some basis for the argument advanced by Mr Crystal.

30. Indeed, the procedure that was adopted was not unusual in an international arbitration, as appears from the following passage from Redfern & Hunter, Law and Practice of International Arbitration, 3rd Edn at para 6-107:

> *"Who has the last word?*

In common law practice, the plaintiff in a court case speaks last, on the basis that he carries the burden of proof. This means that the plaintiff will have two opportunities to make oral submissions, whilst the defendant has only one. In arbitrations this practice is not widely followed, since arbitrators tend to feel, instinctively, that due process is generally served only if the parties are permitted an equal number of opportunities to make oral submissions. Furthermore, the 'burden of proof' point is not wholly valid, because in practice the burden may fall on each party to prove the factual propositions on which it relies."

31. Section 34 of the 1996 Act provides as follows:

"(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter."

32. It is provided by sub-section (2)(h) that procedural matters include: *"whether and to what extent there should be oral or written evidence or submissions."*

33. In my judgment, what the arbitrator did was well within the scope of what he was empowered to do. He regulated procedural matters in a way which accorded to Margulead a reasonable opportunity of putting its case in the context of what was essentially a fair arbitral hearing.

34. Even if there were procedural irregularity in failing to permit an oral reply, there was no objection taken to this course either at the hearing or at any time subsequently prior to the publication of the Award. It is provided by Section 72(1) of the 1996 Act as follows:

"(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection –

(b) that the proceedings have been improperly conducted,

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

35. In this context "forthwith" means as soon as reasonably possible. That clearly involves raising an objection immediately following the arbitrator's procedural ruling. In a case where there is knowledge or reasonable means of knowledge of the grounds for objection, the point must be raised at the hearing. To wait until after publication of the award or indeed until after continuing to participate in the hearing as in this case will be fatal to the right to mount a Section 68 application. Further, the assumption that, because the arbitrator had not permitted a reply, the claimant had won, cannot be supported as reasonable in the context of an international arbitration or of what passed between the arbitrator and counsel on the third day. It was clear in advance that no provision had been made for a reply on behalf of Margulead. With due diligence the grounds for objection would have been obvious.

36. It follows that the application under Section 68 fails. Even if Margulead succeeded on the Affirmation Point, the application would still fail because it could not be established that a serious irregularity in respect of that point had caused substantial injustice. The point is exclusively related to Exide's mutual mistake defence and, since Exide succeeded on both their implied term as to technical feasibility and their Article 1.3 defences, a conclusion that there was a serious irregularity in respect only of the mutual mistake defence could not lead to an award in Margulead's favour.

37. The Affirmation Point

38. In case I am wrong on the Reply Point, I shall briefly indicate my conclusion on the Affirmation Point.

39. The essence of Margulead's complaint is that the arbitrator made no reference in his Award to the argument that Exide could not rely on mutual mistake as a defence because it had affirmed the agreement.

40. Margulead had specifically raised the affirmation and election point in its post-hearing brief. Exide also dealt with the point in its post-hearing brief. The arbitrator stated in his Correction Award in response to Margulead's application that he had given full consideration to all Margulead's arguments (see paragraph 22 above).

41. A deficiency of reasons in a reasoned award is not capable of amounting to a serious irregularity within the meaning of Section 68 of 1996 Act unless it amounts to a "failure by the tribunal to deal with all the issues that were put to it" within Section 68(2)(d). In construing the meaning of (d) one must have regard to Section 70(4). This provides:

"(4) If on an application or appeal it appears to the court that the award

(a) does not contain the tribunal's reasons, or

(b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,

the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose."

42. Deficiency of reasoning in an award is therefore the subject of a specific remedy under the 1996 Act. It is accordingly self-evident that:

i) failure to deal with an "issue" under Section 68(2)(d) is not equivalent to failure to deal with an argument that had been advanced at the hearing and therefore to have omitted the reasons for rejecting it;

ii) Parliament cannot have intended to create co-extensive remedies for deficiency of reasons one of which (Section 68) was a general remedy which might involve setting aside or remitting the award in a case of serious injustice and one of which (Section 70(4)) was designed to provide a specific remedy for a specific problem;

iii) the court's powers under Section 68(2) being engaged only in a case where the serious irregularity has caused substantial injustice, the availability of the facility to apply for reasons or further reasons under section 70(4) would make it impossible to contend that any "substantial injustice" had been caused by deficiency of reasons.

43. The meaning of "*failure to deal with all the issues*" must therefore refer to a failure to deal with a claim or a distinct defence to a claim advanced before the tribunal and not merely to an omission to give reasons for the tribunal's conclusion in respect of such claim or defence. It is in those cases in which the award expresses no conclusion as to a specific claim or a specific defence that the Award can be said to have failed to deal with an issue.

44. In ***Hussman (Europe) Ltd v. Al Ameen Development & Trade Co*** [2002] 2 Lloyd's Rep 83, Thomas J. observed at p97: *"I do not consider that s.68(2)(d) requires a tribunal to set out each step by which they reach their conclusion or deal with each point made by a party in an arbitration. Any failure by the arbitrators in that respect is not a failure to deal with an issue that was put to it. It may amount to a criticism of the reasoning, but it is no more than that."*

45. These remarks were followed by Cresswell J. in ***The Petro Ranger*** [2001] 2 Lloyd's Rep 348 at p351.

46. In the present case, the arbitrator expressly accepted the specific defence of mutual mistake and, according to his Correction Award, he fully considered the affirmation arguments. He therefore necessarily rejected all the submissions of Margulead including those as to affirmation on his point. The Award did not include his reasons for doing so. He had therefore not failed to deal with an issue within section 68(2)(d) but had dealt with the relevant issue (mutual mistake) without giving full reasons for his conclusion on that issue.

47. Accordingly, there was in relation to the Affirmation Point no serious irregularity.

48. This application therefore fails on both the Reply Point and the Affirmation Point.

Mr Jonathan Crystal (instructed by Stock Fraser Cukier) for the Claimant
Mr Toby Landau and Mr Richard East (solicitor advocate) (instructed by Kirkland & Ellis International) for the Respondent